

1  
2  
3  
4  
5  
6  
7       UNITED STATES OF AMERICA,  
8    Plaintiff,  
9    v.  
10      THOMAS JOYCE,  
11    Defendant.

1  
2  
3  
4    UNITED STATES DISTRICT COURT  
5    NORTHERN DISTRICT OF CALIFORNIA

6  
7    Case No. 14-cr-00607-PJH-4

8  
9    **PRETRIAL ORDER NO. 2**

10    Doc. nos. 166, 174, 179, 183, 184, 185,  
11    187, 189, 191, 193, 195, 197, 207, 215,  
12    221, 223, 225

13  
14    This matter initially came on for pretrial conference and motion hearing on January  
15    11, 2017. Counsel for defendant Thomas Joyce ("defendant") informed the court that  
16    counsel for codefendant Glenn Guillory, Marcus Merchasin, was recently hospitalized  
17    and unavailable to appear. Accordingly, the court indicated that it would likely sever the  
18    defendants for trial and continued the pretrial conference and motion hearing to January  
19    13, 2017. Because Mr. Merchasin remained unavailable to appear at the January 13,  
20    2017, hearing, the court severed Guillory's case and proceeded with the pretrial  
21    conference as to defendant Joyce. As stated on the record and summarized below, the  
22    court rules on the motions in limine and other disputed pretrial matters as follows:

23    **I. Severance**

24    At the pretrial conference, counsel for defendant Joyce informed the court that Mr.  
25    Merchasin was recuperating from surgery and gave no indication when he would be able  
26    to appear for pretrial or trial proceedings. Codefendant Guillory stated on the record that  
27    he spoke to his attorney, who told Guillory that he would not be able to appear for trial on  
28    the January 23, 2017, trial date. Due to the continued unavailability of Mr. Merchasin,

1 and the lack of information about when he would be able to appear for pretrial  
2 proceedings and for trial, the court determined that continued joinder of defendants would  
3 result in undue delay, given the need to continue Guillory's trial indefinitely and the limited  
4 availability on the court's calendar to reschedule a joint trial, which would require at least  
5 eight trial days. Counsel for Joyce initially objected to severance and requested a  
6 continuance of the trial because he and Mr. Merchasin had shared responsibilities in  
7 preparing for the pretrial motions and for trial, but conceded that a one-week continuance  
8 of the trial date would ameliorate the concerns about defending the trial alone. The  
9 government consented to severing defendants for trial.

10 Upon weighing the concerns of prejudice to Joyce's defense, which were reduced  
11 by continuing the trial date; Guillory's stated desire to continue being represented by his  
12 retained counsel, Mr. Merchasin, who is unavailable for an indefinite period; and  
13 concerns for judicial efficiency and management of the court docket, the court ordered  
14 that defendants Guillory and Joyce be severed for trial pursuant to Rule 14. The court  
15 further granted a one-week continuance of Joyce's trial date to allow defense counsel  
16 additional time to prepare for trial.

17 **II. Motions in Limine**

18       **A. Government's Motions in Limine (doc. no. 179)**

19       1. The government's motion in limine ("MIL") No. 1 to prohibit defendant  
20 from introducing evidence or argument that the bid-rigging agreements were reasonable,  
21 or that the victims were negligent about the bid-rigging conduct, is GRANTED pursuant to  
22 the court's earlier ruling in Pretrial Order No. 1 denying defendants' motion to adjudicate  
23 the Sherman Act count pursuant to the rule of reason. Doc. no. 139. There, the court  
24 held that bid-rigging is widely recognized as a form of price-fixing, which is "conclusively  
25 presumed to be unreasonable and therefore illegal without elaborate inquiry as to the  
26 precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.*  
27 *Co. v. U.S.*, 356 U.S. 1, 5 (1958). The court further ORDERS that the government shall  
28 refrain from referring to the banks, trustees, and beneficiaries as "victims," given that the

1 government does not need to prove any injury or financial loss as an element of bid-  
2 rigging, and shall instead refer to them as banks, trustees and beneficiaries.

3           2. The government's MIL No. 2 to admit evidence of cooperating  
4 witnesses' guilty pleas and plea agreements, as properly considered by the jury in  
5 evaluating witness credibility, is GRANTED subject to the following procedures:

6           (a) The truthfulness provisions of the plea agreements must remain  
7 redacted, unless the witness's credibility is attacked. See *U.S. v. Monroe*, 943  
8 F.2d 1007, 1013 (9th Cir. 1991) ("a reference to the 'truthful testimony' provisions  
9 of a witness's agreement with the government does not constitute vouching if it is  
10 made in response to an attack on the witness's credibility because of his plea  
11 bargain").

12           (b) The government's questioning during its case-in-chief is limited to the  
13 existence and terms of the guilty pleas and plea agreements, including the factual  
14 basis of the plea, the fact that the cooperator has yet to be sentenced, and the  
15 hope of receiving a reduced sentence partly due to their testimony at trial.

16           (c) References to the potential sentence or potential maximum statutory  
17 sentence that the cooperator could receive must be redacted because it may  
18 signal to the jury the punishment that defendant is facing, though that is a  
19 prohibited consideration; however, the court may permit evidence of a mandatory  
20 minimum sentence that a witness faces in the absence of a motion by the  
21 government. See *U.S. v. Larson*, 495 F.3d 1094, 1106 (9th Cir. 2007) (en banc)  
22 (district court may prohibit cross-examination regarding the potential maximum  
23 statutory sentence that the witness faces, which lacks significant probative force  
24 because a defendant seldom receives the maximum penalty permissible under the  
25 statute of conviction; by contrast, the mandatory minimum sentence that a witness  
26 will receive in the absence of a government motion is "highly relevant to the  
27 witness' credibility").

(d) To minimize the risk of undue prejudice to defendant by introducing evidence of the cooperating witnesses' plea agreements, the court will give limiting instructions based on Ninth Circuit Model Criminal Jury Instruction 4.9 and the ABA model instructions for criminal antitrust cases, as proposed by the parties.

See Proposed Instruction Nos. 37, 38 (doc. no. 191).

6 Under settled Ninth Circuit authority recognizing the probative value of plea agreements  
7 for evaluating witness credibility, the court holds that the probative value of evidence of  
8 the plea agreements, as limited herein, is not “substantially outweighed by a danger of”  
9 unfair prejudice to defendant pursuant to FRE 403. *U.S. v. Halbert*, 640 F.2d 1000, 1004  
10 (9th Cir. 1981) (“evidence of the plea is relevant to credibility regardless whether  
11 government or defendant initiates inquiry about it”); *United States v. Anderson*, 532 F.2d  
12 1218, 1230 (9th Cir. 1976).

13                   3. The government's MIL No. 3 to exclude any evidence or argument  
14 impeaching a witness by introducing evidence of conviction of a crime pursuant to FRE  
15 609(a) is GRANTED as unopposed as to witnesses Kramer, Wong, Vesce and Renquist,  
16 in light of defendant's concession that none of the prior convictions disclosed by the  
17 government meet the standard for impeachment under the rules of evidence. With  
18 respect to witness Barta, the government withdrew its MIL No. 3 to exclude evidence of  
19 Barta's 2007 application for a mortgage and home-equity line of credit after conceding its  
20 admissibility as impeachment evidence. The government's MIL No. 3 with respect to  
21 excluding evidence of citizen complaints is GRANTED on the ground that the prejudicial  
22 effect would outweigh any limited probative value of the complaints from private citizens,  
23 which were not vetted for accuracy or investigated, and the complaints from private  
24 citizens and the California Dept. of Transportation which are not relevant to the bid-  
25 rigging conspiracy and/or are not probative of character for truthfulness.

26                  4. The government's MIL No. 4 to admit business records and public  
27 records under FRE 803(6), (8) and (15), and self-authenticating documents pursuant to

1 FRE 902(1), (4) and (11) is PROVISIONALLY GRANTED, subject to objections that the  
2 defense may raise at trial as to specific documents.

3       5. The government's MIL No. 5 to exclude evidence or argument about  
4 nontestifying coconspirators is GRANTED as unopposed. If either party seeks to refer to  
5 a nontestifying coconspirator's plea agreement or pending indictment, the party must first  
6 make a proffer for its admissibility.

7       6. With respect to the government's notice of intent to admit summary  
8 charts pursuant to FRE 611(a), doc. no. 189, the court determines that the charts  
9 proffered by the government would avoid wasting time from introducing all the underlying  
10 documents. The court further determines that the charts do not appear to be  
11 argumentative or to include selective information from the underlying documents, as with  
12 the summary charts that were ruled inadmissible in the first trial in *U.S. v. Florida*, CR 14-  
13 582. The court will admit non-argumentative charts as summary charts under FRE  
14 611(a). The charts may also be admissible or useable as demonstratives under FRE  
15 1006. See *U.S. v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980) (summary chart was  
16 properly admitted where use of the chart in court contributed to the clarity of the  
17 presentation to the jury, avoided needless consumption of time and was a reasonable  
18 method of presenting the evidence). Defendant did not object to the information  
19 summarized in the charts, but disputed the absence of information about the trustee sale  
20 numbers corresponding to the auction records summarized in the chart marked Appendix  
21 D. The parties are ordered to further meet and confer on including the trustee sale  
22 numbers on the summary chart.

23           **B. Defendant's Motions in Limine**

24       1. Defendant's MIL No. 1 to exclude references to other bid-rigging  
25 trials, which was initially filed as a joint motion with codefendant Guillory, is DENIED on  
26 the ground that evidence related to other bid-rigging trials may be introduced as relevant  
27 background, subject to the instruction that the parties should minimize any references to  
28 trials involving bid-rigging in counties other than Contra Costa County. Doc. no. 185.

1                   2. Defendant's MIL No. 2 to grant additional peremptory challenges is  
2 DENIED AS MOOT following severance of Joyce and Guillory's trials.

3                   3. Defendant's MIL to exclude wholesale admission of his statements to  
4 the FBI and his binder of personal records that he turned over to the FBI is narrowed  
5 down to the following two disputes: (1) defendant's statement to the FBI about observing  
6 rounds in Alameda County, and (2) defendant's notes reflecting amounts received by  
7 Gee. Doc. no. 197. Defendant's MIL and request for evidentiary hearing to exclude  
8 these statements or notes is DENIED on the ground that the references to bid-rigging in  
9 Alameda County are relevant to show defendant's knowledge and lack of mistake with  
10 respect to the bid-rigging activity. The government represents that only the pages from  
11 defendant's binder referring to Contra Costa County properties have been marked as  
12 exhibits. To address defendant's concerns about undue prejudice or cumulative  
13 evidence about Alameda County activity, the court will allow the government to show the  
14 jury the binder from which the pages were taken and admit only the individually marked  
15 pages.

16                  4. With respect to the government's notices of intent to introduce FRE  
17 404(b) evidence, doc. nos. 187 and 221, defendant objects to evidence related to his  
18 participation in Alameda County activity, including witness testimony, as cumulative and  
19 unduly prejudicial in light of his statements to the FBI. Doc. no. 206. Defendant's  
20 objection is OVERRULED in light of the court's instruction to keep references to Alameda  
21 County activity as minimal as possible and on the ground that the government has  
22 demonstrated that the witness testimony about Joyce's participation in Alameda County  
23 is inextricably intertwined with the charged conspiracy and necessary to give a cohesive  
24 explanation about Joyce's business and the context for the spreadsheet and other  
25 documents in the binder. The government has also demonstrated that witness testimony  
26 about defendant's participation in Alameda County auctions and rounds is admissible as  
27 other acts evidence pursuant to FRE 404(b). Doc. no. 187 at 4-6 (citing *U.S. v.*  
28 *Verduzco*, 373 F.3d 1022, 1027 (9th Cir. 2004)). Defendant's objection to the notice of

1 FRE 404(b) evidence as insufficient and lacking specificity about the witness testimony is  
2 OVERRULED. Rule 404(b) requires only “reasonable notice in advance of trial,” which is  
3 satisfied here. See *United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999)  
4 (“reasonable notice is designed to reduce surprise and promote early resolution of  
5 admissibility issues”) (citation omitted).

6 The government has indicated its intent to introduce two sets of ledgers seized by  
7 the FBI from the office of Community Fund, which is owned by Michael Marr who is  
8 charged in a separate case, *U.S. v. Marr*, CR 14-580, but has not sufficiently  
9 demonstrated how the ledgers will be authenticated pursuant to FRE 901(a). Doc. no.  
10 221. “The government need only make a *prima facie* showing of authenticity, as the rule  
11 requires only that the court admit evidence if sufficient proof has been introduced so that  
12 a reasonable juror could find in favor of authenticity or identification. The government  
13 must also establish a connection between the proffered evidence and the defendant.”  
14 *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000) (citations and internal marks  
15 omitted). The government states that Renquist will testify about the form and purpose of  
16 the Community Fund ledgers because the exact same type of ledgers were used to track  
17 Contra Costa County round payments, but the government has not shown that Renquist  
18 has any first-hand knowledge about the ledgers kept by Community Fund, particularly the  
19 ledgers relating to defendant. Doc. no. 221 at 3. Accordingly, the ledgers seized from  
20 Community Fund’s offices will not be admitted unless the government establishes a  
21 proper foundation to authenticate those records, such as through the testimony of a  
22 witness with personal knowledge. FRE 901(b)(1) (“Testimony that an item is what it is  
23 claimed to be.”).

24 5. Defendant’s pretrial conference statement raised requests for  
25 disclosures. Doc. no. 193. The government confirmed that the requested materials in its  
26 possession have been produced to the defense, and that it will continue to meet its  
27 disclosure obligations. The government also stated that it has disclosed the identity of  
28 the confidential source, who will testify under his or her true name.

1       **III. Coconspirator Statements**

2           **A. Legal Standard**

3           In order for a coconspirator statement to be *admissible* at trial under Federal Rule  
4           of Evidence 801(d)(2)(E), the prosecution must show by a preponderance of the  
5           evidence that:

6           (1) the conspiracy existed when the statement was made;  
7           (2) the defendant had knowledge of, and participated in, the conspiracy; and  
8           (3) the statement was made “in furtherance” of the conspiracy.

9           *United States v. Larson*, 460 F.3d 1200, 1212 (9th Cir. 2006), *adopted in relevant part on*  
10          *reh'g en banc*, 495 F.3d 1094, 1096 n.4 (9th Cir. 2007). However, the *introduction* of  
11          coconspirator statements is distinct from the issue of *admissibility*. That is in part  
12          because the court considers all of the evidence, even the defendant’s evidence, in  
13          making the ultimate admissibility determination. See GRAHAM, 30B FEDERAL PRACTICE &  
14          PROCEDURE, EVIDENCE § 7025 at 303-04 (2011 interim ed.) (“[a]t the conclusion of the  
15          presentation of evidence, the trial court on motion must determine *on all the evidence*  
16          *including evidence offered by the defendant* whether the government has established the  
17          requisite foundation to be more probably true than not true”) (emphasis added).

18           It is within the court’s discretion to determine the order of proof or the showing, if  
19          any, that is appropriate prior to the government’s *introduction* of the coconspirator  
20          statements. *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983) (concluding  
21          that it was not an abuse of discretion for the court to allow the government to introduce  
22          coconspirator statements prior to establishing *prima facie* the existence of a conspiracy).  
23          Courts have utilized various approaches regarding the order of proof. One such  
24          approach has been the provisional or conditional admission of the statement subject to it  
25          later being “connected up” at “the conclusion of the presentation of evidence,” at which  
26          time the court must determine whether the government has established the requisite  
27          foundation (as set forth by the Ninth Circuit in *Larson*) to be more probably true than not  
28          true. See GRAHAM, 30B FEDERAL PRACTICE & PROCEDURE, EVIDENCE § 7025; MUELLER &

1 KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:62, Procedure for Applying Coconspirator  
2 Exception (4th ed., updated May 2016); *Arbelaez*, 719 F.2d at 1460.

3 Another approach includes what has essentially been deemed a mini-trial or  
4 *James* hearing in advance of trial at which the court may consider each proffered  
5 coconspirator statement and determine whether the government has established the  
6 required foundational requirements as to each statement. See GRAHAM, FEDERAL  
7 PRACTICE & PROCEDURE, EVIDENCE § 7025 (citing *United States v. James*, 590 F.2d 575,  
8 581-82 (5th Cir. 1979) (en banc)). In a third approach, which has been deemed the  
9 “middle course,” the court requires the government to make a preliminary showing or  
10 summary of its evidence establishing the predicate facts, while deferring the final decision  
11 until the conclusion of the presentation of the evidence. See MUELLER & KIRKPATRICK, 4  
12 FEDERAL EVIDENCE § 8:62; see also *United States v. Cox*, 923 F.2d 519, 526 (7th Cir.  
13 1991) (the “preferable procedure would be to at least require the government to preview  
14 the evidence which it believes brings the statements within the coconspirator rule before  
15 delving into the evidence at trial”).

16 This court adopts the “middle course” on the government’s requisite showing prior  
17 to introduction of the coconspirator statements. In accordance with this approach, the  
18 court will preview prior to trial a summary of the coconspirator statements to be offered by  
19 the government. Following this preview, the court will determine which statements the  
20 government will be permitted to introduce, either through the testimony of a witness or by  
21 documentary evidence. Even though the ultimate finding as to admissibility will not be  
22 made until after the trial has commenced and perhaps as late as the close of the  
23 evidence, the witnesses will be permitted to testify about coconspirator statements and  
24 documents containing such statements will be published to the jury, subject to striking  
25 should the government not be able to meet its burden as to all requirements for  
26 admissibility. In this sense, the government’s introduction of the statements which will  
27 have been previewed and approved by the court, will result in their conditional admission.

1       The court may at some point during trial, and prior to the close of the evidence,  
2 rule on whether the government has shown by a preponderance of the evidence two of  
3 the three prongs required for the admissibility of all of the proffered coconspirator  
4 statements, including that (1) the conspiracy existed when the statement was made; and  
5 (2) that the defendant had knowledge of, and participated in, the conspiracy. *Larson*, 460  
6 F.3d at 1212. The court, however, will not determine until *after* the witness testifies  
7 and/or the documentary evidence containing the particular coconspirator statement is  
8 introduced whether or not the government has shown by a preponderance of the  
9 evidence that the statement was made “in furtherance” of the conspiracy. See *id.* A  
10 coconspirator statement will NOT be unconditionally admitted into evidence until the court  
11 has determined that all three *Larson* prongs have been satisfied as to that statement.

12       As set forth in *United States v. Coleman*, CR 11-904 PJH, and *United States v.*  
13 *Zaragoza*, CR 08-83 PJH, the court has established a protocol requiring the government  
14 to disclose the following information with a list of the coconspirator statements to be  
15 introduced at trial:

- 16             (1) the identity of the testifying witness and/or the source of the conspirator  
17                 statement;
- 18             (2) a statement describing the witness and/or the source of the conspirator  
19                 statement;
- 20             (3) a summary of the evidence showing that the proffering witness, if a  
21                 coconspirator, knew about and participated in the conspiracy;
- 22             (4) the *specific* coconspirator statements to be introduced via that witness and/or  
23                 the source of the conspirator statement;
- 24             (5) the identity of the declarant of *each* specific coconspirator statement; and
- 25             (6) a summary of the evidence showing that *each* declarant of the coconspirator  
26                 statement(s) knew about and participated in the conspiracy.

27       *Zaragoza*, doc. no. 574 (Amended Order for Pretrial Preparation). The government must  
28 also provide particulars of when the proffered statement was made, to establish that it

1 was made during the relevant period. *Larson*, 460 F.3d at 1211 (requiring the  
2 government to establish that “the conspiracy existed when the statement was made”).  
3 This requirement may be satisfied by providing sufficient detail to determine whether the  
4 statements were made in the course of, and in furtherance of, the conspiracy, and does  
5 not require the government to identify the exact date and time that the statement was  
6 made. See *Coleman*, doc. nos. 97 (granting in part motion to clarify pretrial order) and  
7 122 (clarifying pretrial order).

8           **B. Discussion**

9           The government timely filed its initial notice of coconspirator statements in  
10 compliance with the court’s disclosure protocol. Doc. no. 166. Defendant timely filed  
11 objections to the coconspirator statements. Doc. no. 194. The government filed four  
12 supplemental notices of coconspirator statements, to which the court extends defendant’s  
13 objections. Doc. nos. 174, 215, 223, 225.

14           The government prepared charts organizing the coconspirator statements by type  
15 of document, and specifying the date of the alleged coconspirator statement:

16               (A) round sheets which tracked the individuals participating in each round,  
17                   the order of bidding, amount of each coconspirator’s terminal bid, and the  
18                   winner of the round. See Appx. A; Suppl Appx. A; 2d Suppl. Appx. A.

19               (B) payment ledgers which listed the properties in which coconspirators  
20                   participated in a round, and the amount of payoff on each property. See  
21                   Appx. B and Suppl. Appx. B; 2nd Suppl. Appx. B.

22               (C) emails regarding payments owed for rounds. See Appx. C.

23               (D) consensual audio-video recordings of coconspirator statements. See  
24                   Appx. D.

25               (E) other documents containing coconspirator statements: notes on the  
26                   memo lines of payoff checks, and other coconspirator notes relating to  
27                   meetings and payoffs such as Outlook calendar entries noting the dates of  
28                   payoffs and Wesley Barta’s notes summarizing the results of rounds. See

1 Appx. E; Suppl. Appx. E; 2d Suppl. Appx. E.

2 (F) anticipated testimony of witnesses about what coconspirators  
3 said to reach agreements. The summary chart in Appendix F is taken from  
4 witness interview reports, which have not been reviewed or adopted by the  
5 witnesses, and are not verbatim transcripts. See Appx. F; Suppl. Appx. F.

6 To satisfy the first *Larson* prong, the government's brief in support of the notice  
7 establishes the existence of a conspiracy among competitors not to bid against each  
8 other at public auction, involving 3 steps: (a) refraining from bidding against each other  
9 for certain properties at the public auction; (b) negotiating payoffs at the secondary  
10 auctions, also known as round robins or rounds, or "step-aside" payments; (c) completing  
11 the sale by submitting a Receipt of Funds to the auctioneer, receiving the Trustee's Deed  
12 in the mail, and making and receiving payoffs, either by cash or check. Doc. no. 166 at  
13 5-7 and Bond Decl.

14 To establish the second *Larson* prong, the government has sufficiently  
15 demonstrated that the defendant had knowledge of, and participated in, the conspiracy  
16 with the information provided in Appendices A through F, except as to anonymous  
17 documents which lack authentication, i.e., typewritten portions of ledgers that were  
18 seized from coconspirator Michael Marr's office, listed in Appendix B, and unidentified  
19 handwriting on round sheets that were produced by cooperating coconspirators, listed in  
20 Appendix A. The government contends that these documents written by unidentified  
21 authors are admissible as coconspirator statements because there is strong  
22 circumstantial evidence that the documents were made by conspirators in furtherance of  
23 the charged conspiracy. Doc. no. 166 at 13 (citing *United States v. Martinez*, 430 F.3d  
24 317, 326 (6th Cir. 2005) ("An anonymous statement may be admissible under Rule  
25 801(d)(2)(E) if circumstantial evidence permits a finding by a preponderance of the  
26 evidence that there was a conspiracy involving the author and the defendant, and the  
27 statement was made in the course and furtherance of the conspiracy."); *United States v.*

28

1       *Helmel*, 769 F.2d 1306, 1313 (8th Cir.1985) (“What is essential is that the government  
2 show that the unknown declarant was more likely than not a conspirator.”).

3           The government relies on out of circuit authority to support its contention that it  
4 only needs to prove that the anonymous statements were necessarily written by  
5 someone in the conspiracy, without having to provide positive proof to identify the author  
6 to establish admissibility as coconspirator statements. Doc. no. 166 at 14 (citing *Helmel*,  
7 769 F.2d at 1313) (requiring the government to show only that the unknown declarant  
8 was more likely than not a conspirator, without proving the declarant’s identity). The  
9 Ninth Circuit has not, however, expressly adopted this standard. Current Ninth Circuit  
10 authority requires the government to identify, at least by a preponderance of the  
11 evidence, the declarant of anonymous statements that are proffered as coconspirator  
12 statements. In *United States v. Mouzin*, 785 F.2d 682, 692-93 (9th Cir. 1986), the court  
13 held that an anonymous cocaine distribution ledger found in the home of the defendant  
14 was not admissible as the statement of a coconspirator under Rule 801(d)(2)(E), for lack  
15 of a proper foundation, reasoning that “[k]nowledge of the identity of the declarant is  
16 essential to a determination that the declarant is a conspirator whose statements are  
17 integral to the activities of the alleged conspiracy.” Here, the anonymous ledgers seized  
18 from Marr’s office and unidentified handwriting on round sheets similarly suffer from lack  
19 of foundation to authenticate those documents.

20           To establish the admissibility of the anonymous documents as coconspirator  
21 statements, the government cites Ninth Circuit authority applying the preponderance of  
22 the evidence standard for identifying the author of anonymous statements, but those  
23 cases do not hold that anonymous statements are admissible as coconspirator  
24 statements based on evidence showing that the statements would have been made by  
25 an unidentified coconspirator, as the government seems to suggest. In *United States v.*  
26 *Gil*, 58 F.3d 1414, 1420 (9th Cir. 1995), the court held that the government proved by a  
27 preponderance of the evidence that anonymous ledgers were the defendants’  
28 statements, citing circumstantial evidence that the ledgers were located in the

1 defendants' residences and entries corresponded to surveilled activities. See also *United*  
2 *States v. Smith*, 893 F.2d 1573, 1578 (9th Cir. 1990) (holding that the evidence amply  
3 supported the government's theory that an anonymous calendar/drug ledger was  
4 authored by a named coconspirator and that the trial court did not err in admitting it into  
5 evidence under FRE 801(d)(2)(E)); *United States v. Schmit*, 881 F.2d 608, 610 (9th Cir.  
6 1989) (holding that circumstantial evidence was sufficient to show that a named  
7 coconspirator (the defendant's son) was the author of anonymous handwritten notes  
8 under a preponderance of the evidence standard to show admissibility under FRE  
9 801(d)(2)(E)). Unlike the ledgers at issue in *Gil* which were found in the defendants'  
10 home, or the anonymous documents admitted in *Florida* which were seized from the  
11 defendants' offices, the anonymous documents proffered by the government here were  
12 not located in Joyce's home or office, but rather seized from the offices of a defendant  
13 charged in another case or provided by a cooperating coconspirator. The government's  
14 argument that these documents were more likely than not authored by an unnamed  
15 participant in the conspiracy does not establish an adequate foundation for their  
16 admissibility.

17 With respect to anonymous round sheets and ledgers proffered as coconspirator  
18 statements, in the absence of a proper foundation for admissibility required by *Mouzin*  
19 and for authentication under FRE 901(a), the proffered statements by an "unidentified"  
20 author will not be admitted under FRE 801(d)(2)(E). See, e.g., Appx. A, Exs. 100, 123,  
21 145, 161, 218; Appx. B, Exs. 70-74, 250.

22 Except for the anonymous coconspirator statements discussed above, the  
23 government has sufficiently specified (A) the round sheets, (B) payoff ledgers, (C) emails,  
24 and (E) other miscellaneous documents, by providing copies of those categories of  
25 documents. The government also provided transcripts of the excerpts of the (D) audio-  
26 video recordings containing the coconspirator statements, identifying those statements  
27 with sufficient specificity.

28

With respect to witness testimony, defendant objects to the notice of coconspirator statements provided in Appendix F for lack of specificity, particularly as to the time frame of the alleged coconspirator statements which are generally indicated only in years. Doc. no. 194 at 3. Defendant's objection based on lack of specificity is OVERRULED on the ground that the government provided highlighted portions of the underlying FBI witness interview reports to identify the coconspirator statements with sufficient specificity to give the defense notice of the anticipated witness testimony.

#### **IV. Jury Instructions**

##### **A. Jointly Proposed Instructions**

The court adopts the jury instructions proposed jointly by the parties. Doc. no. 191. The parties must file a final set of the jury instructions, reflecting the court's pretrial rulings on all the proposed instructions and referring to a single defendant, by the first day of trial, as well as a blind copy without citations.

##### **B. Disputed Instructions**

The court rules on the instructions that were subject to dispute as follows:

###### **1. Instruction No. 15: Charged Offense**

The government proposes a new ABA model instruction stating the relevant provisions of Section 1 of the Sherman Act. The government contends that the instruction gives context to the Sherman Act references in several other instructions, and that the text of the statute makes plain the importance of the concept of conspiracy in the statutory scheme. Doc. no. 204 at 1. Defendant objects to this instruction as duplicative and unnecessarily emphasizing selective portions of other jury instructions which cover the alleged bid rigging conspiracy. Doc. no. 207 at 3. Here, only a single count is at issue, making a statement of the relevant statute unnecessary and potentially prejudicial. As noted in the ABA commentary to the model instruction, "This is a standard criminal antitrust instruction but is not always given." ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* (2009) at 43. Accordingly, the government's proposed instruction No. 15 is STRICKEN.

**United States District Court  
Northern District of California**

## **2. Instruction No. 16: Per Se Violations of Antitrust Law**

The court ADOPTS proposed instruction No. 16 as unopposed. Doc. no. 207 at 3.

### **3. Instruction No. 18: Bid Rigging**

The government objects to including the following modification to the ABA model bid-rigging instruction, as it was given in *Florida*, as unnecessary: "An internal agreement only between owners and employees of the same company does not constitute a conspiracy." Doc. no. 191. As defendant does not object to deleting this modification following severance of Guillory's trial, this sentence is STRICKEN from proposed Instruction No. 18.

The government also objects to giving the last three optional bracketed paragraphs from the model ABA instruction, which were given in the first *Florida* trial, on the ground that the language relates to conspirators submitting complementary bids which it contends is inapposite here. Defendant objects to removing the optional ABA model language. The court determines these optional paragraphs from the ABA model instruction are not restricted to certain contexts, as the government contends, except for the phrase instructing that the evidence may show that the defendants “submitted bids lower than those agreed upon to customers that they did not want to lose.” Other than that specific phrase, the court ADOPTS the optional ABA model language in proposed Instruction No. 18 as helpful to the jury in weighing the evidence, subject to modification to refer to a single defendant:

Evidence of the bids submitted by the defendants and alleged coconspirators has been admitted to assist you in deciding whether they entered into an agreement to rig bids. Such evidence may lead you to conclude that the defendants never entered into the agreement charged in the indictment or that they did enter into an agreement; or it may show that they made an agreement but failed to live up to it, or started undercutting one another right away, ~~or submitted bids lower than those agreed upon to customers that they did not want to lose.~~ Or it may show that they became convinced the whole scheme was unwise and should be abandoned. Regardless of this type of evidence, if the conspiracy as charged existed, for any period of time, it was unlawful.

1 Evidence of similarity of business practices of the  
2 defendants and alleged coconspirators does not alone  
3 establish an agreement to rig bids, since such activities may  
4 be consistent with ordinary and proper competitive behavior in  
5 a free and open market.  
6  
7

8 Nevertheless, you may consider such facts and  
9 circumstances along with all other evidence in determining  
10 whether the evidence of bids actually submitted or similarity of  
11 business practices resulted from the independent acts or  
12 business judgment of the defendants and alleged  
13 coconspirators freely competing in the open market, or  
14 whether it resulted from an agreement among or between two  
15 or more of them.  
16  
17

18 Doc. no. 191.

19 **4. Instruction No. 19: Elements of Conspiracy**

20 Because defendant is charged with a sole count of bid-rigging, and not a separate  
21 conspiracy count, the court determines that a separate model instruction on the elements  
22 of conspiracy, No. 19, is unnecessary and potentially confusing, in light of stipulated  
23 Instruction No. 17 on the elements of the bid-rigging offense. However, the Ninth Circuit  
24 model criminal jury instruction § 8.20, on which No. 19 is based, contains other language  
25 that will be given as helpful to the jury. The court therefore STRIKES lines 3-11 of  
26 Instruction No. 19 on the elements of conspiracy, and ORDERS the parties to meet and  
27 confer on relocating the remaining language of the model instruction.  
28

29 Defendant objects to the single conspiracy statement that the government  
30 proposed in Instruction No. 19, "a single conspiracy may involve several subagreements  
31 or subgroups of conspirators," which was given in the first *Florida* trial. The government  
32 insists that this language is necessary if the court gives the multiple conspiracies  
33 instruction (proposed instruction No. 22), which defendant requests over the  
34 government's objection. The court determines that both instructions on single conspiracy  
35 and multiple conspiracies will assist the jury, and adopts the single conspiracy instruction  
36 from Instruction No. 19 to be given with the Ninth Circuit model instruction on multiple  
37 conspiracies, No. 22.  
38  
39

**United States District Court  
Northern District of California**

## **5. Instruction No. 21: Owner or Superior-Individual Responsibility**

In light of the court's order severing defendant's trial from Guillory's trial, the government withdrew its proposed instruction No. 21, which is hereby STRICKEN.

## **6. Instruction No. 22: Multiple Conspiracies**

As held above, the court will give proposed Instruction No. 22, based on the Ninth Circuit model instruction on finding multiple conspiracies, with the following single conspiracy instruction: “A single conspiracy may involve several subagreements or subgroups of conspirators.” See *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) (citing *United States v. Tille*, 729 F.2d 615, 621 (9th Cir. 1984)). The government’s proposed modification further elaborating on subagreements is STRICKEN as unnecessary and potentially over-emphasizing a single conspiracy. Doc. no. 204 at 9.

Defendant's proposed modification to the Ninth Circuit model instruction, to add the factors that the Ninth Circuit applies to determine the sufficiency of the evidence to support a conviction based on a single conspiracy, is STRICKEN as potentially confusing and failing to give the jury any guidance on how to weigh the factors, which are applied by courts to determine the sufficiency of evidence of a single conspiracy. Doc. no. 195 at 2 and Ex. A. As the commentary to the Ninth Circuit model instruction states, "This instruction obviates the need for further instructions on multiple conspiracies." (Citing *United States v. Si*, 343 F.3d 1116, 1126-27 (9th Cir. 2003).)

## **7. Instruction No. 23: Interstate Commerce**

The court ADOPTS proposed Instruction No. 23 as unopposed. Doc. no. 207 at 3.

## **8. Instruction No. 37: Testimony of Witnesses Involving Special Circumstances - Immunity, Benefits, Accomplice, Plea**

The court ADOPTS proposed Instruction No. 37 as unopposed. Doc. no. 207 at 3. At the close of evidence, the parties are instructed to modify this instruction to add the specific names of the relevant government witnesses.

1       **V.     Juror Questionnaire and Voir Dire**

2                  As the court stated at the pretrial conference, the court prepared a written juror  
3 questionnaire, which has since been e-filed, that includes questions proposed by the  
4 parties and approved by the court. Doc. no. 184. The court will conduct the voir dire,  
5 and will allow 20 minutes of follow-up questions per side.

6       **VI.    Verdict Form**

7                  The court ADOPTS the proposed verdict form jointly proposed by the parties.  
8 Doc. no. 183.

9                  **IT IS SO ORDERED.**

10                 Dated: January 20, 2017



11                 PHYLLIS J. HAMILTON  
12                 United States District Judge